IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2016
[2016] NZSC 139

BETWEEN	KARL LESLIE RAYMOND MARWOOD Appellant
AND	COMMISSIONER OF POLICE First Respondent
	ERANA KING Second Respondent
	KARL LESLIE RAYMOND MARWOOD AND MARGARET ISABEL MARWOOD AS THE TRUSTEES OF THE PERRIN TRUST Third Respondents
	ANZ BANK Fourth Respondent

Hearing:	17 June 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	R E Harrison QC and M W Ryan for Appellant M D Downs and P D Marshall for First Respondent A G Speed for Second Respondent M W Ryan for Third Respondents No appearance for Fourth Respondent
Judgment:	26 October 2016

JUDGMENT OF THE COURT

A **The disputed evidence is admissible in these proceedings.**

B **The appeal is dismissed.**

C **There is no order as to costs.**

REASONS

WILLIAM YOUNG, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by William Young J)

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The appeal

[1] On 6 July 2010, police officers searched Karl Marwood's house at 12A Laughton Street, Taupō. As a result of what they found, he was prosecuted for cultivating and possessing cannabis for the purpose of sale, selling cannabis and stealing electricity. In the course of those proceedings, Mr Marwood successfully challenged the search warrant on which the police officers had relied when searching his house. This resulted in the exclusion of the evidence derived as a result of the

search.[1] The prosecution was left without an evidential basis for the prosecution and Mr Marwood was accordingly discharged under s 347 of the Crimes Act 1961.[2]

[2] The Commissioner of Police (the Commissioner) has commenced proceedings under the Criminal Proceeds (Recovery) Act 2009 (CPRA) seeking profit forfeiture orders against Mr Marwood, his partner Erana King and a trust associated with them: the Perrin Trust.[3] The claim is addressed to benefits which are said to have accrued to Mr Marwood and Ms King as a result of significant criminal activity and is largely based on the evidence which was excluded in the criminal proceedings. In issue is whether the Commissioner may rely on the results of the search in the CPRA proceedings.

[3] In a pre-trial determination, Cooper J held that the Court had jurisdiction to exclude the evidence in the CPRA proceedings and that, in the exercise of his discretion, exclusion of the evidence obtained as a consequence of the search was appropriate.[4] The Commissioner's appeal against this judgment was successful in the Court of Appeal, with that Court concluding that there was no jurisdiction in civil proceedings to exclude evidence on the grounds that it was unlawfully obtained.[5] The Court also said that if such a jurisdiction existed, it should not be exercised.[6]

[4] The critical issues in the case are whether there is jurisdiction to exclude the evidence[7] in the CPRA proceedings and, if so, whether it should be exercised. To set the scene for our discussion of these questions, it is appropriate for us to review briefly the criminal proceedings, the CPRA proceedings and the legal context provided by the evolution of the rules as to the admissibility of, and power to exclude, improperly obtained evidence.

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1 *R v Marwood* DC Rotorua CRI-2010-069-1318, 14 April 2011 [*Marwood* prosecution].

2 We will refer to this as the "criminal proceedings".

3 ANZ Bank is also a party as it holds a mortgage over some of the assets targeted by the proceedings.

4 *Commissioner of Police v Marwood* [2014] NZHC 1866 [*Marwood* (HC)] at [34] and [62]–[63].

5 *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 (Harrison, Stevens and Wild JJ) [*Marwood* (CA)] at [44].

6 At [59].

7 The evidence sought to be excluded was not defined with precision. Cooper J, in his judgment, simply referred to "the evidence obtained as a consequence of the search": *Marwood* (HC), above n 4, at [3]. We propose to discuss the case simply by reference to whether the evidence as to what was found in the Taupo house should be excluded.

The criminal proceedings

[5] On 23 June 2010, a member of the public, Rex Kirby, received a telephone call. The caller inquired whether he was speaking with "the police". Mr Kirby replied in the affirmative as he thought the caller was from the police. The caller said: "For your information I can't tell you who I am, at 12A Laughton Street, Karl has marijuana plants growing in the back of his property." Mr Kirby reported the call to the police. Relying in large measure on this tip-off, the police sought and obtained a search warrant on 30 June 2010.

[6] The warrant was executed on 6 July 2010. In the course of it, the police found a reasonably substantial cannabis growing operation underway along with a significant amount of dry cannabis and scales. At interview Mr Marwood and Ms King both made admissions. Mr Marwood was charged with cultivation of cannabis, possessing cannabis for the purpose of sale, selling cannabis and theft of electricity. No charges were laid against Ms King.

[7] Under s 198 of the Summary Proceedings Act 1957 (as applicable to this case, but now repealed):

> (1) Any District Court Judge or Justice or Community Magistrate, or any Registrar (not being a constable), who, on an application in writing made on oath, is satisfied that there is reasonable ground for believing that there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place—
>
> (a) Any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or
>
> (b) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or
>
> (c) Any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence—
>
> may issue a search warrant in the prescribed form.

The warrant was thus invalid unless there were reasonable grounds to believe that a cannabis growing operation was underway at Mr Marwood's house.

[8] The material set out in the application was particular to the 12A Laughton Street house and to an offender known as "Karl". It also showed that Mr Marwood, whose first name is Karl, was associated with that address. This association provided some support for the tip-off as did Mr Marwood's prior convictions for similar offending, albeit that this offending had occurred 13 years previously.[8] The inquiries made by the police as to the reliability of the tip-off were, however, far from extensive. In the result the lawfulness of the search fell to be determined by reference to the limited material relied on in the search warrant application.

[9] Mr Marwood's challenge to the search warrant succeeded as Judge Bouchier concluded that the application established merely a suspicion of offending.[9] She also placed weight on the lack of any police inquiries about the reliability of the information.[10] She was of the view that the search warrant was invalid and that the search was unlawful and in breach of s 21 of the New Zealand Bill of Rights Act 1990. In exercising her discretion to exclude the evidence, the Judge recorded that while the police were not guilty of acting in bad faith, their actions had been "sloppy".[11]

[10] Judge Bouchier's ruling meant that there was no admissible evidence against Mr Marwood and he was discharged under s 347 of the Crimes Act 1961.

The CPRA proceedings

[11] In the CPRA proceedings, the Commissioner contends that Mr Marwood, Ms King and the Perrin Trust have received benefits totalling $334,130.10 from the cultivation and sale of cannabis, obtaining by deception and theft of electricity. The Commissioner seeks orders forfeiting the house at 12A Laughton Street, bank accounts in Mr Marwood's name and two motor vehicles.

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8 The search warrant application did not provide any information as to when the prior offending had occurred.

9 *Marwood* prosecution, above n 1, at [49].

10 At [42].

11 At [52].

[12] Section 3 of the CPRA is in these terms:[12]

> **3 Purpose**
>
> (1) The primary purpose of this Act is to establish a regime for the forfeiture of property—
>
> (a) that has been derived directly or indirectly from significant criminal activity; or
>
> (b) that represents the value of a person's unlawfully derived income.
>
> (2) *The criminal proceeds and instruments forfeiture regime established under this Act proposes to—*
>
> *(a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity*; and
>
> (b) deter significant criminal activity; and
>
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
>
> …
>
> (emphasis added)

The aspirational language of s 3(2)(a) gives a clear and emphatic signal as to the legislative purpose.

[13] Section 4 relevantly provides:

> **4 Overview**
>
> (1) In general terms, this Act—
>
> (a) provides for the restraint and forfeiture of property derived as a result of significant criminal activity without the need for a conviction; and
>
> …

[12] For completeness sake we note that the Criminal Proceeds (Recovery) Regulations 2009 provide for the forms to be used and address matters as to service and the costs of the Official Assignee. None of these matters are before the Court.

Significant criminal activity is defined in this way:

> **6 Meaning of significant criminal activity**
>
> (1) In this Act, unless the context otherwise requires, **significant criminal activity** means an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending—
>
> (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
>
> (b) from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived.
>
> (2) A person is undertaking an activity of the kind described in subsection (1) whether or not—
>
> (a) the person has been charged with or convicted of an offence in connection with the activity; or
>
> (b) the person has been acquitted of an offence in connection with the activity; or
>
> (c) the person's conviction for an offence in connection with the activity has been quashed or set aside.
>
> …

[14] The claim against the respondents is civil in nature. This is because s 10 provides:

> **10 Nature of proceedings**
>
> (1) Proceedings relating to any of the following are civil proceedings:
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> …
>
> (d) a profit forfeiture order:
>
> …

[15] Civil forfeiture orders are addressed by subpart 3 of Part 2 of CPRA. Under s 43, the Commissioner may apply for a civil forfeiture order. Where such an application is made, the Court must make a profit forfeiture order if satisfied on the balance of probabilities that the respondent has unlawfully benefited from significant

criminal activity and has "interests" in property.[13] A profit forfeiture order must specify (a) the value of the unlawful benefit derived; (b) the maximum amount recoverable; and (c) the property to be disposed of.[14] If the Commissioner proves on the balance of probabilities that a person has benefitted unlawfully from significant criminal activity, the value of that benefit is presumed to be the value stated in the application.[15] The respondent may rebut that presumption on the balance of probabilities.[16] Sections 61–69 provide for the Court, in certain circumstances – including innocent ownership – to grant relief to persons other than the respondent in respect of property which is the subject of an application or order for forfeiture.

[16] In the exercise of CPRA functions, the Commissioner is required to act independently and is not responsible to the Attorney-General or any other Minister of the Crown.[17]

[17] The CPRA confers investigative powers associated with the obtaining of evidence which is material to actual or contemplated forfeiture proceedings, including provision for search warrants,[18] the obtaining of production orders in relation to documents,[19] and examination orders (which can be addressed to the obtaining of documents and other information).[20] The powers conferred are very similar to those which apply in relation to the investigation of offending.[21]

[18] Section 94 makes specific provision for what is to happen if material is obtained unlawfully in the purported exercise of powers conferred by the CPRA. Such material may not be used, either by way of evidence in proceedings or otherwise in connection with the exercise of powers under the CPRA, unless the High Court is satisfied that the there was no unfairness in the obtaining of the

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13 Section 55(1).
14 Section 55(2). Section 5 defines a profit forfeiture order as one made under s 55.
15 Section 53(1).
16 Section 53(2).
17 Section 92(1).
18 Sections 101, 102 and 108.
19 Sections 104 and 105.
20 Section 106 and 107.
21 See generally the Search and Surveillance Act 2012.

evidence.[22] The CPRA, however, does not address the use which may be made of material which was otherwise unlawfully obtained.

[19] Civil forfeiture regimes such as that provided for by the CPRA have been the subject of some controversy.[23] Given s 10 of the CPRA, we must approach the case on the basis that the present proceedings are civil in character. This is consistent with s 6(2) which makes it clear that remedies under the CPRA are not dependent upon conviction. The statute thus provides for sanctions in circumstances in which the criminal law is not engaged. On the other hand, there is substantial overlap between the purposes of the CPRA – removing economic incentives to offend and, in this way, disincentivising offending – and those of the criminal law. As well, the role of the Commissioner as applicant and the investigative powers available (which are closely akin to those exercisable in relation to criminal investigations) emphasise the public character of proceedings under the CPRA and the analogy with criminal proceedings.

The legal context - evolution of the rules as to the admissibility of, and power to exclude, improperly obtained evidence

The common law position as to unlawfully obtained evidence prior to the enactment of the New Zealand Bill of Rights Act 1990

[20] The general common law position was that illegally obtained evidence was admissible and this applied in criminal[24] and civil cases.[25] This was qualified in

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22 Section 94(3). The language of this provision was substantially borrowed from s 22 of the Serious Fraud Office Act 1990. As will become apparent from what appears later in these reasons, it incorporates an approach to admissibility which was current in 1990 but no longer reflects current practice, see [21] below. It is therefore somewhat anachronistic in a statute enacted in 2009 as the CPRA was.

23 See for instance Liz Campbell "The Recovery of 'Criminal' Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm" (2010) 41 VUWLR 15; and Kenneth Mann "Punitive Civil Sanctions: The Middleground Between Civil and Criminal Law" (1992) 101 Yale LJ 1795.

24 See *Kuruma, Son of Kaniu v The Queen* [1955] AC 197 (PC) at 203. There is an enigmatic passage in the opinion of the Board which refers to the exclusion of evidence obtained from a defendant by "a trick", see at 204. This was explained in narrow terms in *Regina v Sang* [1980] AC 402 (HL) at 434–435 by Lord Diplock. *Kuruma* involved an unlawful search which resulted in the finding of ammunition which, in turn, led to the appellant facing, and being convicted of, the capital charge of unlawful possession of ammunition. Despite the "trick" reference, *Kuruma* was decided on the basis that there was no discretion to exclude the evidence of the finding of the ammunition.

25 See *Kuruma*, above n 24, at 204; and *Lord Ashburton v Pape* [1913] 2 Ch 469 (CA) at 474 per Kennedy LJ, and at 476-477 per Swinfen Eady LJ.

criminal cases by the development of a practice of judges indicating to prosecutors that evidence should not be called where its prejudicial effect outweighed its probative value.[26] By the second half of the last century this practice had hardened into a discretion to exclude such evidence.[27] The form in which this discretion was described (prejudicial effect outweighing probative value) meant that it was not obviously engaged where the impropriety by which evidence was obtained did not affect its probative value. English courts accepted that there was a discretion to exclude confessions obtained unfairly or improperly (for instance by breach of the Judges Rules) – either as a subset of the prejudicial effect/probative value discretion or, perhaps as a special case[28] – but, after some vacillation on the issue in the 1970s, in 1980 the House of Lords in *R v Sang* came down firmly against the proposition that there was a general discretion to exclude improperly obtained evidence. [29]

[21] The law took a different course in New Zealand. In a series of cases from the mid-1970s on, New Zealand courts held that judges were entitled to exclude improperly obtained evidence, including that obtained by reason of entrapment,[30] and there was no change of course after *Sang* was decided.[31] The jurisdiction to exclude was explained as being based on either or both a discretion to exclude improperly obtained evidence and the power of a court to address abuse of its process.[32] Sometimes these two bases were conflated as in *R v Coombs* where Somers J, after referring to the relevant New Zealand authorities, observed:[33]

> The principle stated in those cases is that evidence obtained by illegal searches and the like is admissible subject only to a discretion, based on the

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26 See *The King v Christie* [1914] AC 545 (HL) at 559 per Lord Moulton, and at 564–565 per Lord Reading and the cases cited therein.

27 Such a discretion was recognised in *Kuruma*, above n 24, at 204.

28 See *Kuruma*, above n 24, at 205.

29 *Sang*, above n 24, at 434–437 per Lord Diplock with whom Viscount Dilhorne, Lord Salmon, Lord Fraser of Tullybelton and Lord Scarman agreed.

30 See *R v Capner* [1975] 1 NZLR 411 (CA). *Capner* addressed arguments based on the activities of an undercover police officer and alleged entrapment, as did *Police v Lavalle* [1979] 1 NZLR 45 (CA); and *R v Loughlin* [1982] 1 NZLR 236 (CA). *Sang* involved broadly similar arguments around the activities of a police informer/agent provocateur and undercover officers who were said to have instigated the offending alleged. See also *Police v Hall* [1976] 2 NZLR 678 (CA); *R v Hartley* [1978] 2 NZLR 199 (CA); and *R v Grace* [1989] 1 NZLR 197 (CA).

31 See *R v Loughlin*, above n 30, at 238; and *R v Coombs* [1985] 1 NZLR 318 (CA) at 321.

32 See for instance *Hartley*, above n 30.

33 *Coombs*, above n 31, at 321 writing on behalf of a Court also consisting of Woodhouse P and Eichelbaum J.

> jurisdiction to prevent an abuse of process, to rule it out in particular instances on the ground of unfairness to the accused.

The way in which the principles were applied focused very much on fairness considerations assessed in the context of the particular trial in question. So the courts did not apply a remedial approach, that is by inquiring whether exclusion was an appropriate remedy for breach of the right which had been infringed.[34]

[22] Although the courts thus recognised a power to exclude illegally obtained evidence in criminal cases, there was no corresponding development in relation to civil cases in the sense that there are no reported cases in which such a power has been exercised. It was, however, recognised that where documents have been obtained unlawfully, the true owner may achieve their return and, if they are otherwise inadmissible, say as privileged, this may preclude them being later used in evidence.[35] If documents are obtained in circumstances amounting to a contempt of court, it may also be an abuse of process to rely on them in evidence.[36]

The jurisprudence as to unlawfully obtained evidence after the New Zealand Bill of Rights Act but before the Evidence Act 2006

[23] Section 21 of the New Zealand Bill of Rights Act provides:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

A search which is illegal will almost always be in breach of s 21.[37] Other forms of police impropriety, particularly as to the questioning of suspects and conduct involving those who have been arrested, may also involve breaches of the New Zealand Bill of Rights Act. All of this meant that in the aftermath of the enactment of the New Zealand Bill of Rights Act, the courts had to decide what approach (or approaches) should be taken where evidence relied on by the prosecution had been obtained in breach of the New Zealand Bill of Rights Act.

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34 Many of the cases involved entrapment and in such a cases a remedial approach would have been awkward to apply.

35 *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431.

36 As was the case in *ITC Film Distributors*, above n 35.

37 See *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

[24] The courts initially applied the common law position that there was a jurisdiction to exclude improperly obtained evidence[38] and did so by adopting what was known as the prima facie exclusionary rule to such evidence, that is, that such evidence should be excluded unless there was good reason to contrary.[39] By doing so, the courts were in fact providing a remedy for breach of the New Zealand Bill of Rights Act, albeit that some time elapsed before the courts adopted an expressly remedial rationale for the exercise of this jurisdiction.[40]

[25] *Baigent's case* established that monetary relief could be awarded for breaches of the New Zealand Bill of Rights Act.[41] Although *Baigent's case* was concerned with monetary relief, the reasoning of the judges made it clear that the exclusion of evidence in criminal cases was to be viewed as a remedy. This was explained by Cooke P in this way:[42]

> I am satisfied that the purpose and intention of the Bill of Rights Act is that there be an adequate public law remedy for infringement obtainable through the Courts which … are already according it in the sphere of criminal law. What is adequate will be for the Courts to determine in the circumstances of each case. In some it may be that already obtainable under existing legislation or at common law: in others, where such remedies are unavailable or inadequate, the Court may award compensation for infringement, or settle on some non-monetary option as appropriate. In this way the rights affirmed by the Bill [of Rights Act] can be protected and promoted as an integral part of our legal framework.

[26] The recognition that exclusion of evidence was a remedy for a breach of the New Zealand Bill of Rights Act was highly material to the on-going debate as to the basis upon which the power to exclude evidence obtained in breach of the New Zealand Bill of Rights Act should be exercised. In the end, the prima facie exclusion rule was abandoned by the Court of Appeal in *Shaheed* in favour of a balancing exercise to be carried out with a view to determining whether exclusion of the evidence in question is necessary to vindicate the right which was breached.

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38 See for instance *R v Kirifi* [1992] 2 NZLR 8 (CA).

39 See *R v Butcher* [1992] 2 NZLR 257 (CA) at 266 per Cooke P.

40 The relevant cases are reviewed in the judgment of Blanchard J in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [111]–[132].

41 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

42 At 692.

[27] In considering whether exclusion is appropriate the availability of other remedies is material. But for reasons explained by Blanchard J in *Shaheed*, such remedies are of limited relevance in criminal cases in which the prosecution relies on evidence obtained in breach of the New Zealand Bill of Rights Act:

> [153] … The broad question is whether, as a matter of course, it is necessary to consider whether the breach of an accused's rights can adequately be marked out and redressed in whole or in part by a remedy (if one is needed) which does not involve exclusion of vital and reliable evidence; and whether the answer to that inquiry may also be taken into account in the balancing exercise. The obvious difficulty is that other remedies are unlikely to be found satisfactory to provide vindication of the right in a criminal case involving a serious breach of a right whereby the police have obtained important evidence against the accused. In such circumstances, if the evidence were to be admitted and were to lead to the conviction of the accused, only the most cynical observer could take the view that a declaration by the Court that the right had been breached or reference to the Police Complaints Authority, possibly leading to a disciplinary proceeding against the transgressing police officer, could provide a form of redress which truly vindicated the right.
>
> [154] An award of *Baigent* damages to a convicted criminal serving a long sentence as a means of recompensing him or her for the use at trial of evidence which the police had obtained improperly might look strange. It would appear to have no precedent elsewhere in the jurisdictions we have surveyed. So too, perhaps, would the imposition of a reduced sentence. The apparent advantage to society of convicting and locking up a particular criminal in a particular case would be outweighed by the general public perception that the police could now breach the rules and still secure such a result. Unless the crime were especially serious or involved an ongoing risk to public safety, such an outcome would be regarded by a dispassionate observer as bringing the administration of justice into disrepute.
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> [155] It is therefore preferable where a conviction ought to lead to a sentence of imprisonment, to put out of consideration the possibility of a means of redress other than exclusion of the disputed evidence and to make a decision on its admissibility by an appropriate balancing of other relevant factors.

The relevant provisions of the Evidence Act 2006

[28] The Evidence Act 2006 (the Act) was enacted in response to reports of the Law Commission and is broadly along the same lines as a draft code prepared by the Commission.[43] The Act was intended to be comprehensive in the sense that it is drafted in terms which envisage that all evidential issues which arise should be able

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[43] See Law Commission *Evidence: Reform of the Law* (NZLC R55 Volume 1, 1999); and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Volume 2, 1999).

to be addressed by reference to its provisions,[44] albeit that some of these contemplate at least some resort to the common law.[45]

[29] Sections 7 and 8 are in these terms:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
>
> (a) inadmissible under this Act or any other Act; or
>
> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
>
> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[30] The next provisions of relevance are ss 11 and 12:

> **11 Inherent and implied powers not affected**
>
> (1) The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise.
>
> (2) Despite subsection (1), a court must have regard to the purpose and the principles set out in sections 6, 7, and 8 when exercising its inherent or implied powers.
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> **12 Evidential matters not provided for**
>
> If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions

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44 See for instance ss 11 and 12.

45 Most obviously, ss 10(1)(b), 12(b) and 12A.

deal with that question only in part, decisions about the admission of that evidence—

(a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and

(b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.

[31] Finally, there is s 30:

30 Improperly obtained evidence

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence …

(2) The Judge must—

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

…

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

…

(c) unfairly.

Section 30(3) provides a non-exhaustive list of criteria as to the exercise of the s 30(2)(b) function.

A residual jurisdiction to exclude, otherwise than under s 30, admissible but unfairly or improperly obtained evidence

[32] *Fan v R* concerned admissions which had been obtained without impropriety on the part of the police but which the appellant contended were nonetheless unfair because they resulted from erroneous legal advice given to him by his lawyer.[46] Because the police had acted properly, the Court of Appeal was of the view that s 30 was not engaged, that is the evidence was not "unfairly obtained". The Court of Appeal nonetheless considered that there was a discretion to exclude the evidence, albeit that it did not exercise it:[47]

> We conclude that there remains a general common law discretion to exclude evidence where its admission would be unfair, but conclude, for the reasons given, that the statements should not be excluded.

In the present case, it is not necessary for us to decide whether the Court was right:

(a) to conclude that s 30 was not engaged;[48] and, if that conclusion was right,

(b) that there was nonetheless a residual discretion to exclude.

The jurisdiction issue

The High Court judgment

[33] Although relying to some extent on *Fan* as indicative of an approach to admissibility not shackled by the primary admissibility and exclusion provisions of the Act, Cooper J primarily relied on the New Zealand Bill of Rights Act.[49] He found the 6 July 2010 search was unreasonable and in breach of s 21 and that the evidence was thus "improperly obtained".[50] He continued that the New Zealand Bill of Rights Act would be reduced to irrelevance if the evidence were admitted on the

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46 *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29.

47 At [52].

48 See the remarks of the dissenting judges in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [324]–[338] per Elias CJ, and at [465]–[518] per Glazebrook J. The point was not addressed by the other judges.

49 See *Marwood* (HC), above n 4, at [18]–[34].

50 In the sense provided for by the Evidence Act 2006, s 30(5)(a). Of course, s 30 was used as a guide only as it did not actually apply.

basis that the proceedings were civil and the evidence was relevant.[51] He noted that the courts had developed a range of remedies including the exclusion of improperly obtained evidence.[52] He concluded that ss 7 and 30 of the Act did not "oust" the relevant provisions of the New Zealand Bill of Rights Act. In doing so, he invoked s 12 of the Act on the basis that "s 30 has dealt with the admission of improperly obtained evidence only in part, its provisions being limited to cases arising in the Court's criminal jurisdiction."[53] In his view, evidence excluded as a remedy under the New Zealand Bill of Rights Act could be said to be excluded under another Act for the purposes of s 7(1)(b).[54]

The Court of Appeal approach

[34] The Court of Appeal referred to the relevant legislative history. It saw the evidence derived as a result of the search as admissible in the CPRA proceedings in that it was relevant for the purposes of s 7. The critical passages of its judgment are as follows:

> [33] … . The [New Zealand Bill of Rights Act] is a codification of protected rights and freedoms including, by s 21, the right to be secure against unreasonable search. Courts in this country have long recognised a judicial discretion to exclude probative but unfairly obtained evidence in criminal cases. This power originated in the common law, not according to statute, and preceded the [New Zealand Bill of Rights Act]. The same discretion remained after the [New Zealand Bill of Rights Act]'s enactment, informed for example by s 21 but independently of it. In affirmation of the power of exclusion recognised by this Court in *Shaheed*, the legislature has provided that one of the statutory prerequisites to exclusion is a finding that evidence is improperly obtained if it is obtained in breach of s 21 of the [New Zealand Bill of Rights Act].
>
> [34] In a criminal proceeding a judge is entitled to exercise the discretionary power of exclusion if satisfied that that remedy is proportionate to the breach after taking account of the factors specified in s 30(3). If granted, this remedy vindicates a breach of the s 21 [New Zealand Bill of Rights Act] right. But that is not because in terms of s 7(1)(b) the evidence is excluded "under … any other Act" – the [New Zealand Bill of Rights Act]. In order to meet that statutory criterion the [New Zealand Bill of Rights Act] would have to provide expressly or by necessary implication that "evidence of a particular description is inadmissible in a court proceeding." As *Shaheed* confirms, the [New Zealand Bill of Rights Act] does not prescribe or provide for the consequences of a breach of its provisions. The evidence

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51 At [26].
52 At [27] and [28].
53 At [31].
54 At [32].

> is excluded because of a judicial determination based on a discretionary evaluation of statutory criteria as they apply to the particular circumstances.
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> …
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> [36] Nor do we regard s 12 of the Evidence Act as dispositive. It simply deals with cases for which there is "no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part". The Judge reasoned that s 30 of the Evidence Act has dealt with the admission of improperly obtained evidence only in part because of its limitation to criminal proceedings. For the reasons which we have set out, we are satisfied that the limitation was deliberate. Admissibility generally, including in a civil proceeding, is expressly addressed by ss 7 and 8. The situation is not one where it is necessary to invoke the [New Zealand Bill of Rights Act] to fill a lacuna of the type envisaged by s 12.

Our approach

[35] Prior to the enactment of the Act, we think that in proceedings akin to the present (that is by way of law enforcement and with a public officer as a plaintiff) it would have been open to a judge to exclude evidence which had been obtained in breach of the New Zealand Bill of Rights Act. Such exclusion would have been by way of remedy for the breach. To use the expression which now appears in s 7(1)(b) of the Act, evidence so excluded could be said to have been "excluded under … [the New Zealand Bill of Rights] Act". For this reason it seems to us that exclusion of evidence as a remedy in this case would not be in breach of the s 7(1) "fundamental principle" that relevant evidence is admissible.

[36] As will be apparent, we prefer the approach taken by Cooper J on this issue to that of the Court of Appeal. On the Court of Appeal's approach, s 7(1)(b) applies only if the "other Act" provides (expressly or by implication) that "evidence of a particular description is inadmissible in a court proceeding."[55] We regard this as a reasonable paraphrase of s 7(1)(a) but as a reading down of s 7(1)(b).

[37] In company again with Cooper J, we see s 11 as providing support for this approach; this is on the basis that the powers of a court to provide remedies for both abuse of process and breach of the New Zealand Bill of Rights Act are within the "inherent and implied powers of a court". We agree with the Chief Justice that the

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[55] At [34], citing *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011 at [58].

obligations of the courts imposed by s 3 of the New Zealand Bill of Rights Act are important considerations in relation to breaches of that Act.[56]

[38] Accordingly, we find that there was jurisdiction to exclude the evidence.

Is exclusion an appropriate remedy?

The approach of Cooper J

[39] In ruling in favour of the respondents, Cooper J relied on the following considerations:

(a) The Commissioner is both the plaintiff and head of the New Zealand Police (which can be seen as a branch of the executive government and thus an instrumentality of the Crown) and is seeking to rely on evidence obtained as a result of unlawful acts by members of the police.[57]

(b) That the proceedings are civil in nature is not determinative as the respondents would not have a remedy in trespass.[58]

(c) Exclusion would not be contrary to the primary purpose of the CPRA as set out in s 3(1).[59]

(d) Section 30 of the Act was applicable by analogy and a discretionary balancing exercise along the lines provided by s 30 suggested that exclusion of the evidence would be a proportionate response to the breach of s 21.[60]

(e) The alternative remedy postulated by s 30(3)(f), of a claim for compensatory damages, would be inherently problematic[61] and

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56 See below at [61].
57 *Marwood* (HC), above n 4, at [44] and [45].
58 At [47].
59 At [53].
60 At [49].
61 At [56].

contrary to the approach favoured by Blanchard J in *Taunoa v Attorney-General*.[62]

[40] Cooper J concluded:

> [61] I add that I have found unattractive the suggestion … that because the remedy of exclusion had been applied in the criminal proceeding, the right had been sufficiently vindicated. Such an approach seems to me wrong in principle. I consider it more appropriate to focus on the fact that there was a breach of rights. The fact that it is once vindicated should not have the consequence that the breach is able to be set on one side for subsequent purposes. In my view, that would diminish the importance of the right. It would also be contrary to the rule in s 6 of the Interpretation Act 1999 that enactments apply to circumstances as they arise. Section 21 of the Bill of Rights Act should not cease to have effect merely because it has been applied in one relevant context when the same facts are relied on for a second time.
>
> [62] I consider that to allow the evidence to be relied on for the purposes of the Commissioner's application for forfeiture orders when it has already been excluded for good reason in the criminal proceeding would not take proper account of the need for an effective and credible system of justice.

The approach of the Court of Appeal

[41] The Court of Appeal started with the purposes of the CPRA, namely the establishing of a regime for forfeiture of property which is either derived from significant criminal activity or represents the value of a person's unlawfully derived income.[63] Section 3(2) shows that the CPRA's objective is to eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity or to deter such activity. The evidence in question tends to prove Mr Marwood's participation in significant criminal activity. Forfeiture of benefits derived from that activity would be entirely consistent with the statutory purpose.

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62 At [57]. See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256].

63 *Marwood* (CA), above n 5, at [11]–[17].

[42] The Court of Appeal then considered that the s 30 test for determining whether exclusion is proportionate to the breach of that right and some of the s 30(3) criteria as tailored to criminal proceedings[64] and "inapt" for a discretionary inquiry in civil proceedings.[65] The Court then went on to say:

> [53] The one statutory factor which may be relevant in a civil proceeding is the nature of the impropriety and in particular whether it was deliberate, reckless or done in bad faith (s 30(3)(b)). A finding that the police acted with that degree of consciousness or deliberation is likely to be decisive for exclusion in both the criminal and civil jurisdiction. In a criminal proceeding exclusion on this ground may lead to a discharge; in a civil proceeding proof of bad faith may constitute an abuse of process, sufficient to justify a stay or an analogous remedy, as noted above.

[43] The Court considered that Blanchard J's reasons in *Taunoa* were not of assistance and did not provided authority for the proposition that exclusion should be the primary remedy in a civil proceeding where a breach of the New Zealand Bill of Rights Act has resulted in evidence being improperly obtained.[66]

[44] The Court also referred[67] to its earlier decision in *Clark v R*.[68] In *Clark* the Court was satisfied within the meaning of s 30(3)(f) that the previous exclusion of evidence was relevant in a later and unrelated prosecution where the same evidence was tendered for propensity purposes and in particular that the earlier exclusion has provided a significant alternative remedy.[69]

[45] The Court of Appeal, in this case, concluded this section of its judgment in this way:

> [59] We are satisfied that, if a discretion exists, the evidence should be admitted in this proceeding. The right to a forfeiture order under the CPRA is not dependent upon proof of criminal liability. The statutory regime stands on its own. So, for example, the fact that a criminal proceeding is quashed, or a conviction has been set aside, does not affect the right to apply for a profit forfeiture order. Furthermore, the statutory objective is not punitive or compensatory, but is intended to deprive somebody of the amount by which he or she has unlawfully benefited from significant criminal activity.

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64 At [51].
65 At [52].
66 At [54].
67 At [56].
68 *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214.
69 At [26].

> [60] The CPRA regime is designed to ensure that a person is not enriched by criminal activities. A forfeiture order would simply return Mr Marwood to the same financially neutral position he would have been in but for his participation in significant criminal activity. It would be contrary to public policy to allow Mr Marwood to retain the financial fruits of his crime where the evidence, even though improperly obtained, is nevertheless highly probative, not only of his participation in significant criminal activity but also of his receipt of an unlawful benefit.

Our approach

[46] Despite the way the issue has been sometimes described in other cases, we do not see the case as turning on the exercise of a discretion. Rather what is required is an evaluative assessment – necessarily open-textured but nonetheless not discretionary in nature – as to the appropriateness of the remedy proposed.

[47] *Baigent's case* shows that there can be a financial remedy for searches in breach of s 21.[70] In that case, there having been no offending and thus no prosecution, the question of exclusion of evidence did not arise.

[48] Despite the dismissal of the charges against him, it would have been open to Mr Marwood (and perhaps Ms King) to have sought compensation for the unlawful search. Given this – and leaving aside any issues of delay or limitation – there is no reason why such claims should not be brought and heard at the same time as the Commissioner's proceedings. The relief obtainable would be confined to a vindication of the rights which were breached and non-economic loss, such as, for instance, loss of privacy and distress. It could not encompass an entitlement to retain benefits derived from significant criminal offending, for such a claim would be contrary to the policy of the CPRA and public policy generally. We accept that it may be that such a claim would fail on the basis that the judgment of Judge Bouchier and the dismissal of the charges were a sufficient vindication of the breach of rights which had occurred. This may suggest that any further vindication in the form of exclusion of evidence in the CPRA proceedings would not be warranted.

[49] The present case sits somewhere between the criminal case postulated by Blanchard J in *Shaheed* and the situation in *Baigent's case*. There is scope for

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[70] *Baigent's case*, above n 41.

different views as to where on that continuum it lies. To our way of thinking, however, what is critically important is that CPRA proceedings involve only a claim for money and, in particular, to the proceeds of criminal conduct. Mr Marwood and Ms King are not at risk of conviction and imprisonment. To the extent to which they have an entitlement to compensation, that entitlement can, at least in a practical sense, be set off against any forfeiture to the Commissioner. In these circumstances, the incongruity of financial relief discussed by Blanchard J in *Shaheed* does not arise.

[50] The real question is whether relief by way of exclusion of evidence is proportionate to the breach of rights. In company with the Chief Justice, and for the reasons she gives, we do not regard the conduct of the police as a serious breach.[71] There was information warranting inquiry. Although the correctness of Judge Bouchier's judgment was not in issue, it may be that other judges would have arrived at a different result in applying s 30. Also significant is the acknowledgment of breach in the judgment of Judge Bouchier and the dismissal of the criminal proceedings, as well as the policy of the CPRA, as the Court of Appeal stressed. Forfeiture is not dependent upon conviction. It follows that considerations which preclude conviction (as the unlawfulness of the search did in the case of the prosecution against Mr Marwood) do not necessarily exclude forfeiture. The terms of s 3 as to purpose are firm to say the least and the result arrived at by Cooper J is not very congruent with s 3(2)(a).

[51] In contradistinction, we do not regard the factors referred to by Cooper J in the passage of his judgment set out above in [40] as convincing. In this passage, Cooper J implied that the vindication of the breach of s 21 represented by Judge Bouchier's ruling is entirely irrelevant, a proposition which we do not accept. To take that vindication into account when determining whether further relief is appropriate and most certainly does not mean s 21 of the New Zealand Bill of Rights Act ceases "to have effect". This is not to say that evidence of the kind in issue on this appeal – that is evidence which has been excluded in criminal proceedings – will always be admissible under the CPRA. So, if for example, the police have acted in bad faith, a judge may well conclude that the further vindication of exclusion of

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[71] See below at [70]–[71].

evidence in a CPRA proceeding is required. As already noted, s 94 of the CPRA contemplates exclusion of evidence obtained unlawfully in the purported exercise of powers under that Act.

[52] For the reasons just given, we are of the view that relief in the form of exclusion of evidence would not be proportionate to the breach of rights involved.

Disposition

[53] The disputed evidence is admissible in these proceedings and the appeal is dismissed.

[54] As to costs, it is not in dispute that the search which gave rise to this litigation was illegal. Further, the appellant was successful in one of the two arguments advanced to this Court and this in respect of what is an important issue of principle. For those reasons, we do not make an order as to costs.

ELIAS CJ

[55] In an application for forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 (proceedings that are described in the Act as "civil" proceedings[72]), the Commissioner of Police seeks to call evidence that, in a search of premises occupied by the appellant, a cannabis growing operation was found. This evidence is relevant to the forfeiture claim in which the Commissioner must show, on the balance of probabilities, that the person against whom forfeiture was sought, has unlawfully benefited from "significant criminal activity".[73] It is common ground that the search which obtained the evidence was unlawful because, although authorised by search warrant, the search warrant was invalid. The questions for the present appeal are whether there is jurisdiction to exclude the evidence in the Criminal Proceeds (Recovery) Act proceedings and, if so, whether the evidence should be excluded.

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72 A characterisation that, although it is not in issue in the present appeal, may not always be determinative in cases concerning rights, as the decisions of the European Court of Human Rights suggest: see *Benham v United Kingdom* (1996) 22 EHRR 293 (ECHR) at [56]; and *Engel v Netherlands* (1979) 1 EHRR 647 (ECHR) at [81]–[87].

73 As defined in s 6.

[56] The determination of unlawful search was made in the District Court at a hearing to determine whether the evidence of search was admissible in a criminal prosecution of Mr Marwood for cultivation of cannabis.[74] Judge Bouchier excluded the evidence, because it had been obtained in breach of s 21 of the New Zealand Bill of Rights Act 1990 (which protects against unreasonable search and seizure) and in application of the process provided for exclusion of improperly obtained evidence in criminal cases by s 30 of the Evidence Act 2006. The ruling was not appealed.

[57] The Police Commissioner has instituted proceedings in the High Court to obtain a forfeiture order and seeks to rely on the evidence of search, earlier excluded in the criminal prosecution. In the High Court, Cooper J held both that the Court had jurisdiction to exclude the evidence and that its exclusion was appropriate in the exercise of the Court's power to exclude.[75] On appeal to the Court of Appeal it was held that, following enactment of the Evidence Act, the Court has no power to exclude relevant evidence unless it falls within the general exclusionary rule provided by s 8.[76] The Court also recognised that a stay of proceedings may be available in extreme cases, such as where evidence has been obtained through violence, deception or bad faith.[77] But it seems to have considered that a general discretion to exclude evidence does not survive the enactment of the Evidence Act except in cases covered by s 8 of the Act. Section 8 of the Evidence Act permits exclusion if evidence will "have an unfairly prejudicial effect on the proceeding" or "needlessly prolong the proceeding". It was not suggested that the evidence obtained by search could be excluded in application of s 8.[78] The Court of Appeal accordingly overturned the order for exclusion made in the High Court. The appeal is brought from that determination.

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74 *R v Marwood* DC Rotorua CRI-2010-069-1318, 14 April 2011 (Judge Bouchier).
75 *Commissioner of Police v Marwood* [2014] NZHC 1866.
76 *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 (Harrison, Stevens and Wild JJ) at [31].
77 At [39].
78 An argument to that effect had been made in the High Court but was rejected: see *Commissioner of Police v Marwood* [2014] NZHC 1866 at [33].

[58] The Court of Appeal conclusion that there is no power to exclude improperly obtained evidence in civil proceedings following enactment of the Evidence Act turns on the view that such jurisdiction is impliedly removed by s 30 of the Evidence Act. It depends on accepting that the provision of a statutory requirement to exclude improperly obtained evidence in criminal proceedings where exclusion is "proportionate to the impropriety", without making distinct provision for the position in civil proceedings, entailed necessary and deliberate exclusion of the former common law inherent jurisdiction to exclude such evidence in civil proceedings.[79]

[59] Section 30 does not on its face purport to be exclusive of the circumstances in which improperly obtained evidence may be excluded. Nor is such result a necessary consequence of the enactment of s 30.

[60] I am of the view that the Court of Appeal's approach is inconsistent with s 11 of the Evidence Act. Section 11 makes it clear that "[t]he inherent and implied powers of the court are not affected by this Act, except to the extent that this Act provides otherwise".[80] I am unable to agree that s 30 "provides otherwise". Section 30 captures and partly modifies the then-current common law principles governing the circumstances in which the power to exclude evidence was formerly exercised in criminal proceedings (replacing the earlier common law principle that such exclusion was the prima facie response to impropriety).[81] The restatement in the legislation is endorsement of the view that such exclusion must be considered in each case without presumption as to exclusion and prompts consideration in such assessment of a number of non-exclusive but commonly-relevant factors which apply to criminal proceedings only. The inclusion of s 30 and the structure it enacts for determining questions of exclusion in criminal proceedings does not explicitly or

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79 As to which, see *Queen Street Backpackers Ltd v Commerce Commission* (1996) 2 HRNZ 94 (CA) at 97 in which the Court of Appeal recognised in civil proceedings that were "quasi-criminal" in nature "that there is a discretion to exclude evidence that has been unfairly obtained". See also *Attorney-General v Equiticorp Industries Group Ltd* [1995] 2 NZLR 135 (CA) at 140, which recognised that the discretion of a judge in criminal cases to exclude evidence applied where necessary in civil cases too. The equivalence is recognised now in s 8 of the Evidence Act 2006 but the inherent power to make such orders as appear just is wider than the prejudicial/probative assessment.

80 Evidence Act 2006, s 11(1).

81 *R v Shaheed* [2002] 2 NZLR 377 (CA) overruled the earlier prima facie exclusionary rule.

directly oust the powers of the court to exclude in civil proceedings evidence improperly obtained.

[61] The only modification of the inherent and implied powers preserved by s 11 is that they must be exercised to "have regard to the purpose and principles set out in ss 6, 7 and 8" of the Evidence Act. The requirement to "have regard to" does not suggest that the power to exclude evidence which is relevant and not "unfairly prejudicial" is removed, as is the effect of the argument for the Commissioner. Section 6 provides that one of the purposes of the Act is that rules of evidence are to "recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990". The courts, which are bound by s 3 of the New Zealand Bill of Rights Act to give effect to it, are not precluded from excluding evidence for breach of the New Zealand Bill of Rights Act, if that course is appropriate to meet the impropriety. In addition, I agree with William Young J that evidence excluded for breach of the New Zealand Bill of Rights Act is evidence which may be excluded, even though relevant, "under any other Act" for the purposes of s 7(1)(b).[82]

[62] Exclusion of evidence, in the inherent or implied power of the courts to control its proceedings, may provide a remedy for breach to the individual rights-holder. It is also however a response that may be required by s 3 of the New Zealand Bill of Rights Act. Whether evidence should be excluded depends on contextual assessment in the circumstances of the particular case. The assessment made in another proceeding is not determinative, either for or against exclusion in the particular case.

[63] The Court of Appeal indicated that, had it been of the view that there was jurisdiction to exclude evidence in the Criminal Proceeds (Recovery) Act proceedings, it would have exercised such power to admit the evidence discovered on the search.[83] It considered that the statutory regime under the Criminal Proceeds (Recovery) Act "stands on its own" so that "the fact that a criminal proceeding is quashed, or a conviction has been set aside, does not

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82 See above at [35]–[36].

83 *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [59]–[61].

affect the right to apply for a profit forfeiture order".[84] This consideration seems to me to be in part a statement of the obvious, but one which was irrelevant to the question for the Court. There was no question but that the application for profit forfeiture order was properly made, irrespective of whether a criminal proceeding based on the same conduct had resulted in a conviction. Nor does it seem to me that the Court of Appeal approached matters correctly in its emphasis on the fact that the statutory objective under the Criminal Proceeds (Recovery) Act was "not punitive or compensatory, but is intended to deprive somebody of the amount by which he or she has unlawfully benefited from significant criminal activity".[85] Any such application still needs to be made on evidence that it is proper to admit. That question, which I regard as the critical one, was not properly considered by the Court of Appeal because of the approach it took. Nor is it of significance that a forfeiture order "would simply return Mr Marwood to the same financially neutral position he would have been in but for his participation in significant criminal activity".[86]

[64] The proper assessment to be made was whether the breach of the New Zealand Bill of Rights Act necessitated exclusion of evidence, even though it was "highly probative". That analysis was not undertaken. It turns, principally, on assessment of the seriousness of the breach of the New Zealand Bill of Rights Act and the extent to which it is proper for the court to be co-opted into countenancing it. It cannot be sufficient answer that the ends justify the admission (as is suggested) without further consideration of the nature of the breach.

[65] I consider it is also inadequate to view breach of the New Zealand Bill of Rights Act and the trespass entailed in proceeding on an invalid warrant in searching a home as a question of private relief only. The public interest in observance of the New Zealand Bill of Rights Act and proper and lawful police conduct means that the question of admission must be considered on a principled basis. Stripping "unlawful benefit" is no more sufficient justification for

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84 At [59].
85 At [59].
86 At [60].

admission of unlawfully obtained evidence than convicting the guilty.[87] There is public interest in both ends. That does not answer whether the question of the means used should be countenanced, as s 30 makes clear in relation to criminal proceedings. While exclusion of evidence in the inherent power of the court requires some consideration of whether exclusion is a proper response to the breach, that is not the same thing as deciding that breaches of rights are always justified in the case of forfeiture, as is the effect of the reasoning in the Court of Appeal.

[66] I do not accept that the earlier "acknowledgement of breach in the judgment of Judge Bouchier and the dismissal of the criminal proceedings" absolves the Court from considering the question of exclusion on a principled basis.[88] It cannot be principled to treat exclusion of evidence in one proceeding as sufficient observance of fundamental rights.

[67] It seems to me that in every case where evidence is challenged it is necessary to consider the application on its merits, without any preconception derived from the outcome in earlier proceedings. Nor is it appropriate to take the view that the different nature of forfeiture justifies less concern about observance of the human rights contained in the New Zealand Bill of Rights Act. Such an approach seems to me to minimise the public interest in fulfilment of human rights by the courts and by the police by viewing the decision as to exclusion simply as remedy for the person affected and one that can be fulfilled by partial undoing. It could allow egregious breaches of rights to be overlooked or treated as spent in impact without proper consideration of rule of law considerations. It is, in my view, the sort of reasoning which is likely to prove slippery.

[68] It follows that I am in substantial agreement with Cooper J in the High Court that the outcome in the criminal proceedings was, if not completely irrelevant, then of little significance.[89] That is not as it was treated in the reasons of the Court of Appeal.

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87 Compare *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [60].
88 See above at [50].
89 *Commissioner of Police v Marwood* [2014] NZHC 1866 at [61].

[69] The correct approach is to focus on the breach of s 21 in the circumstances of the current application. In that consideration, I do not rely on the fact that Mr Marwood may have a claim for compensation under the principles discussed in *Baigent*.[90] Even if such a remedy is available in principle, such possibility does not preclude exclusion of evidence as the immediate response here sought. Monetary relief is not an obvious response, as Blanchard J noted in *Taunoa v Attorney-General*.[91] It is preferable in my view to confront directly the question whether exclusion of evidence is warranted by the impropriety. As has been indicated, I do not see that as warranting an exclusively remedial perspective.

[70] The invalidity here arose out of what the District Court Judge considered to be insufficient information to amount to "reasonable grounds" to believe that cannabis was being grown at Mr Marwood's house, as s 198 of the Summary Proceedings Act 1957 required before a warrant was sought. That was a matter of judgment but, viewed prospectively, it was not baseless. There was evidence in the form of a tipoff that "Karl" was cultivating cannabis at 12A Laughton Street. The police were able to establish that Mr Marwood's first name is "Karl" and that he lived at the address. Mr Marwood was also known to the police to have had a conviction for similar offending, although some years before. The application was not, therefore colourable. And it passed the judicial officer who issued the warrant. The ensuing search conformed with the authorisation provided by the warrant on its face. The error made by the police was in a judgment as to sufficiency of information, rather than any conscious evasion of the statutory criterion.

[71] It should be noted in this connection that I do not consider that absence of bad faith tells in favour of admission. It has long been accepted at common law and following codification that bad faith on the part of investigating authorities is itself a basis for exclusion of evidence obtained.[92] But here the error arose from sloppy policing, and the sloppiness was not of a high level of seriousness. Although further

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90 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

91 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256].

92 See *R v Alladice* (1988) 87 Cr App R 380 (CA), also discussed in David Ormerod and Diane Birch "The evolution of the discretionary exclusion of evidence" [2004] Crim LR 767 at 781–782.

enquiries should have been made by the police before a warrant was sought, there was a basis for the application.

[72] In considering the question of admission, it is relevant too that the important information obtained was real evidence. Although at the hearing of the appeal Mr Harrison QC indicated that there was further evidence to which objection would be made as tainted, should the evidence of search be excluded, he acknowledged that was a "downstream" matter, not presently in issue and dependent on the outcome of this appeal.

[73] It is true that the warrant was executed at a home, but there was no suggestion of any incursion of privacy beyond that circumstance. It is relevant, too, in the assessment of whether exclusion of relevant evidence is an appropriate response to impropriety, that the proceeding in which it is sought is not one in which Mr Marwood is in jeopardy of a criminal conviction.

[74] I would therefore dismiss the appeal, but for reasons which differ from those given in the Court of Appeal.

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